







around US\$415 million and that by November 2011, ransom payments paid by shipping companies to Somali pirates in 2011 had already reached nearly US\$110 million.” He explains that ransoms paid directly by shipowners (usually dropped by plane) and subsequently the owner seeks reimbursement from a Kidnap and Ransom (K&R) insurer and with each ransom paid, the K&R insurance premium increases. Because in 2008, the Gulf of Aden was designated as a War Risk Area by the Joint War Committee the Indian Ocean became a War Risk Area in January 2011 meaning additional insurance premiums for the industry.

K&R is an important tool that enables ransom payments for seafarers while restoring certain costs to the ship owner. Poomintr Sooksripaisarnkit writes in this volume that this kind of insurance contract was introduced into the market by Lloyd’s of London long before the recent rise in piracy, and he underscores that there is no standard K&R policy available and thus the scope of coverage is a determined in the construction of each policy. Protection & Indemnity Clubs (P & I Clubs) provide third party liability insurance for shipowners adding to operating costs. As Tulloch notes, “the ransom payments are but a small part of the overall economic impact of piracy. Increased insurance rates for merchant vessels; the added costs to shipping companies to avoid high risk areas, to hire security teams and to “harden” vessels against attack; the costs to deploy and sustain naval forces, and the prosecution costs, as well as the secondary economic impact to local tourism and fishing industries and regional investment. ”

Yet although States deploy substantial naval assets to protect shipping, including the thirty-five percent of the world’s oil and gas and half of world’s container traffic steaming through the Strait of Bab el-Mandeb to the Gulf of Aden and the Indian Ocean while policing ever vaster ocean spaces, the trends indicate that few of the postulated goals are met. As to maritime piracy, the strategies in pace have produced a minimum order of the oceans

#### **MARITIME PIRACY CONDITIONS: LAND, POWER AND LAW**

General and specific conditions have shaped the trends described. Certain derive from socioeconomic and geopolitical realities, others derive from decisions made by global elites. They correspond to outcomes on land, to power-based strategies, to the constitutive process and its decision outcomes. Consider the conditions shaping piracy outcomes pertaining to land, power and law.

Our existing minimum order of the oceans is connected to conditions on land. For all the necessary focus on the oceans, piracy is also a land-based

problem. James Kraska writes in this book, “while the threat of piracy poses a relatively minor inconvenience to most states, the effect on East Africa has been devastating—tantamount to a blockade.” Poor economic development and socio-political instability are the conditions that spawn piracy.<sup>6</sup> Somalia is an extremely poor and a failed state where, in the south especially, people live with an expectation of violence. There has been no effective central government since 1991 when President Siad Barre was deposed. The Transitional Federal Government (TFG) established in 2004 exercises minimal control and is in a struggle against Al Shabaab insurgents. The State is weak, the culture is strong, and disparate groups wield power to gain control over territory and institutions.

The autonomous Government of Puntland is relatively calm, but also facing Al Shabaab incursions from the south. Geography presents a formidable challenge. Like the rest of Somalia, there is minimal road infrastructure and pirate groups are among isolated valleys, mountains and along a coast line that is very difficult to monitor. In the Forward to this book, The President of Puntland outlines genuine steps his government has undertaken to confront piracy, but he underscores the constraints owing to a lack of capacity. He writes of the “need to develop alternative livelihoods for coastal communities affected by piracy and illegal fishing.” The prevailing conditions encourage vulnerable youth to join pirate organizations or al-Shabaab.

Although development is desperately needed and people are poor, pirates fully engage the modern media environment employing social media such as Twitter and maintaining contact with the diaspora. Edward Giradet writes that , “in many ways, Somalia remains one of the best connected countries in Africa. This has enabled the pirates to maintain close contacts with outside investors... Negotiations for ransoms and the release of hostages and ships are typically carried out by satellite phones or Skype and usually take three months to a year. ...Pirate coordinators have become incredibly sophisticated even if the bulk of their cohorts are illiterate and uneducated local men from the mainland.”

There are few effective sanctions to modify unauthorized behavior whether of pirate organizations or al-Shabaab. With poverty and limited means to sustain a dignified life, the opportunity cost of choosing to become a pirate is low. It is a decision to pursue a specific value- wealth- even if that pursuit is fraught with personal risk. And as Tulloch writes in this volume, “what

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<sup>6</sup> See Chassot, *et al*, this volume.

constitutes an acceptable level of risk to a Somali pirate bears no resemblance to a western understanding of risk.” From the pirates’ standpoint a successful operation generates positive wealth outcomes in marked contrast to otherwise impoverished conditions. Hence the analysis presented by Chassot *et. al.* is very pertinent as they underscore that pirate behaviour can be considered rational, citing Peter Leeson’s neologism “*pirational choice.*”

Pirate behavior follows the maximization postulate which "holds that living forms are predisposed to complete acts in ways that are perceived to leave the actor better off than if he had completed them differently."<sup>7</sup> Choices, and the strategies employed to implement those choices, are deliberate decisions intended to improve one’s stakehold from the standpoint of the decision-maker. The decision to engage in piracy is a rational choice calculated to maximize a stakehold as measured against other choices. That trend continues. And it is both an individual and collective choice, hence Chassot *et. al.* consider the nature of the pirate enterprise as a firm characterized by investment, wealth-maximization and the spread of risk. It should be added that pirate organizations are of a culture characterized by close kinship and custom with robust operational codes. And pirates pose, at least instinctively, the same question as the beneficiaries of globalization: “Who gets what, how, where and why?”<sup>8</sup>

## POWER

While international law depends on global expectations of authority, the efficacy of the system depends upon a power process that is a component of all law -the sanctioning process that protects the integrity of the system of public order.<sup>9</sup> Expectations of effective control are fundamental to the establishment of law in any community. Authority joined with control establishes and maintain processes of authoritative decision which amount to public order.<sup>10</sup>

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<sup>7</sup> “The postulate draws attention to the actor's own perception of the alternative act completions open to him in a given situation.” See, HAROLD D. LASSWELL, *A PRE-VIEW OF POLICY SCIENCES* (1971).

<sup>8</sup> Harold D. Lasswell, *The Structure and Function of Communication in Society*, in Lyman Bryson, ed., *The Communication of Ideas*, (1964).

<sup>9</sup> “Sanctions are patterns of conduct employed in a social context with the expectation of influencing conformity to a norm of the context.” Richard Arens & Harold D. Lasswell, In *Defense of Public Order: The Emerging Field of Sanction Law*, Columbia University Press (1961).

<sup>10</sup> Myres S. McDougal and W. Michael Reisman and Andrew Willard, *The World Process of Effective Power: The Global War System* in M.S McDougal and W.M. Reisman, eds., *Power and Policy in Quest of Law* 353 (1985).

Mahnoush H. Arsanjani and W. Michael Reisman appraise maritime piracy as “..a problem of the restoration and maintenance of public order rather than as a *stricto sensu* legal problem”<sup>11</sup> and consider seven specific sanctioning strategies:

- (1) *Preventing* imminent discrete public order violations;
- (2) *Suspending* current public order violations;
- (3) *Deterring*, in general, potential future public order violations;
- (4) *Restoring* public order after it has been violated;
- (5) *Correcting* the behavior that generates public order violations;
- (6) *Rehabilitating* victims who have suffered the brunt of public order violations; and
- (7) *Reconstructing*, in a larger social sense, in order to remove conditions that appear likely to generate public order violations.<sup>12</sup>

Arsanjani and Reisman write that, “the common denominator of each of these strategies ...is to protect, reestablish, or create a public order characterized by low expectations of violence and a heightened respect for human rights.”<sup>13</sup> Features of the existing counter-piracy strategies discussed in this volume merit review and adjustment as urged by the authors.

The instruments of power authorized for the application of maritime piracy law are described and appraised by many contributors to this volume. As James Kraska writes in these pages, “manned and unmanned aircraft are operating from South Africa to India, patrolling against roving gangs of Somali pirates. Thirty nations have deployed naval and maritime law enforcement forces to the region ... The nations that have sent forces to the region are interested in suppressing maritime piracy, but they do so within a distinct political and strategic context.” This includes NATO which maintains a Combined Task Force (CTF 508). There is also Combined Task Force 151 (CTF 151) a multinational task force to counter maritime piracy in the Horn of Africa established in January 2009 by the commander of naval forces for U.S. Central Command and based in Bahrain. The counter-piracy effort is coordinated via regular Shared Awareness and Deconfliction (SHADE) meetings in which all parties participate. At-sea coordination between the different groups, the independent deployers (Russia, China,

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<sup>11</sup> Mahnoush H. Arsanjani & W. Michael Reisman, East African Piracy and the Defense of World Public Order, in Hestermeyer, *et al*, Law of the Sea in Dialogue 137 (2011).

<sup>12</sup> See also, Richard Arens and Harold D. Lasswell, In Defense of Public Order: The Emerging Field of Sanction Law, 199-201 (1961)

<sup>13</sup> Mahnoush H. Arsanjani & W. Michael Reisman, East African Piracy and the Defense of World Public Order, in Hestermeyer, *et al*, Law of the Sea in Dialogue 139 (2011).

India, Japan and Malaysia) and the merchant vessels is achieved via a secure Internet based system called Mercury.<sup>14</sup>

The European Union (EU) is present with EU-NAVFOR an Operation Atalanta that protects shipment of humanitarian aid to Somalia with the World Food Programme (WFP) and the African Military Mission in Somalia, cooperates to deter acts of piracy and armed robbery at sea in the Red Sea, Gulf of Aden and part of the Indian Ocean, and protects vulnerable shipping. The taskforce also monitors fishing activities off the Somali coast. Cédric Leboeuf, writes in these pages that “collective use of force is a relatively new concept for the EU.”

China has dispatched a naval unit consisting of two destroyers and a supply ship to the Gulf of Aden on an anti-piracy mission to primarily protect Chinese ships and crew on board, as well as ships carrying humanitarian relief material for international organizations, including the World Food Programme. The Chinese Navy has escorted about three thousand merchant vessels since deploying the first unit to the region in 2009.<sup>15</sup>

A key component of the power arrangements are mechanisms that facilitate intelligence and coordination. These include IMO initiatives whose Assembly first adopted a resolution concerning piracy in 1983. The IMO has played an integral role in the development of regional cooperation agreements including ReCAAP, MOWCA and the Djibouti Code of Conduct and the world of its Maritime Safety Committee (MSC) write Arthur Bowring, Alexander McKinnon and Patrick Chaumette. The Contact Group on Piracy off the Coast of Somalia (CGPCS) was created pursuant to Security Council resolution 1851 (2008). This *ad hoc* forum with five working groups discusses and coordinates actions conducted by the States and international organizations working off the Somali coast. “The Maritime Security Centre – Horn of Africa (MSCHOA) was established on 8 December 2008 by the European Union Naval Force (EU NAVFOR) Somalia with support from the shipping industry pursuant to UN Security Council Resolutions 1814 (15 May 2008), 1816 (2 June 2008) and 1838 (7 October 2008).

Port State Control (PSC) is another preventive strategy writes Dr. Z. Oya Özçayır, especially in relation to the International Ship and Port Facility Security (ISPS) code. Port state control is integrated in the control process as

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<sup>14</sup> See Tom Tulloch, this volume.

<sup>15</sup> Li Yancheng, “Chinese Navy escorted over 3,000 merchant vessels in Gulf of Aden”, *People's Daily Online*, 10 March 2011 <<http://english.peopledaily.com.cn/98666/101812/101886/7314838.html>>.



a mechanism for enforcement of maritime security measures in capable and networked ports and by preventing sub-standard shipping practices. The PSC system aims to ensure sure that well maintained and equipped vessels with better qualified crew are the norm. Thus PSC is a strategic mechanism to control piracy, particularly under an expanded view that includes armed robbery. A key PSC problem is the lack of capacity in less developed countries in regions where pirates operate. Port authorities and port state control offices share information. The International Maritime Bureau (IMB), a specialized division of the International Chamber Of Commerce (ICC) maintains a 24 hour manned Piracy Reporting Center that makes real time data available to the maritime community. In sum, there are ample mechanisms for the sharing of intelligence, both in civilian and military sectors.

An effective preventive measure includes the Best Management Practices for protection against Somalia based Piracy (BMP-4), revised in 2011 and implemented by the shipping industry. These practices, as detailed in the this volume, have been a helpful preventive strategy, though not perfect. The IMO International Ship and Port Facility Security Code (ISPS Code) stipulates another preventive strategy whereby vessels are to be equipped with Ship Security Alert Systems (SSAS) to be activated in event of attack. As Simon Delfau explains, vessels are equipped with Automatic Identification Systems (AIS). AIS allows all vessels in the vicinity equipped with the system to receive reciprocating information.

There is increasing resort to the private sanctioning capacities of private maritime security companies (PMSC).<sup>16</sup> The International Chamber of Shipping (ICS) acknowledged the use of armed guards to combat piracy in February 2011, and in October 2011 the Government of the United Kingdom announced plans to license armed guards for merchant ships in pirate-infested waters. Delfau writes, “shipowners use PMSCs because they do not have any other choice, as military forces are unable to ensure security in the whole High Risk Area.” And as Martin Murphy observes, “ given that naval capacity is being cut, there is a real concern that armed guards will become a permanent feature for all ships transiting “at risk” areas worldwide.” The P&I Clubs are concerned that the employment of armed guards may prove to be in conflict with the law of the Flag State of the vessel or of the Port State. Poomintr Sooksripaisarnkit writes, “... if the use of armed guards is prohibited by the laws of the flag state or the port state, this may go to the

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<sup>16</sup> Defined by IMO Circular MSC.1/Circ.1405/Rev.1 as “Private contractors employed to provide security personnel, both armed and unarmed, on board for protection against piracy.”

breach of the implied warranty of legality and the in event of a fight between armed guards and pirates causing deaths or injuries to crewmen, there will be complicated factual question of causation. This may be hard to determine considering that surveyors and the authorities will only arrive on the scene after the incident.”

The Security Association for the Maritime Industry (SAMI) is working on standards and accreditation processes for PMSCs in line with the IMO guidance.<sup>17</sup> The Swiss Government and the International Committee of the Red Cross (ICRC), have produced the *Montreux Document* which addresses legal concerns arising from the use of private military and security companies, including respect for international humanitarian law including by “ private military and security companies to protect merchant shipping against acts of piracy.”<sup>18</sup> The International Ship and Port Facilities Security (ISPS) Code stipulates that “[a]t all times the Master of a ship has the ultimate responsibility for the safety and security of the ship.”<sup>19</sup> As Bowring and McKinnon write, “[F]rom a practical point of view, if a ship is carrying experienced security personnel or navy personnel, it may be difficult for a master to enforce control during a pirate attack.” Still, no vessel utilizing private armed guards security team has been taken by Somali pirates.

In August 2012, The Round Table of International Shipping Associations wrote to United Nations Secretary General Ban Ki-Moon urging the “...establishment of a UN Force of Armed Military Guards that can be deployed in small numbers onboard merchant ships.” A United Nations peacekeeping operation on board private vessels require UN Security Council action and could produce a tectonic shift in counter-piracy sanctioning. One aim of The Round Table proposal is to, “... restrict the growth of unregulated privately contracted armed security personnel,” according to the writers. In contrast with private security firms, a UN force would be bound by the laws of war, humanitarian law and human rights law and would be trained in the observance and implementation of associated norms and rules and would possess the privileges and immunities of UN civil servants while performing their duties.

There is precedent for UN maritime peace enforcement. Since 2006 the United Nations Interim Force in Lebanon (UNIFIL) has included a UN Maritime Task Force. A UN Maritime Force deployed onboard merchant

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<sup>17</sup> For more information refer to <<http://seasecurity.org/standards-accreditation>>.

<sup>18</sup> The document was finalized by consensus on 17 September 2008 by 17 States.

<sup>19</sup> See Guidance Regarding the Provisions of Chapter XI-2 of the Annex to the *SOLAS Convention* as amended, pt 4.10.

ships could be ad hoc, on-call or standing force. From the creation of the United Nations, States have been allergic to the creation of a UN standing force as control of the military instrument is an attribute of State sovereignty upon which the functioning of the United Nations depends. The most politically palatable mechanism is likely a maritime peace enforcement mission of limited scope (ad hoc) and limited duration designed for counter-piracy contingencies.<sup>20</sup>

With the maritime security architecture in place, the instruments of power in support of law, why is not a fully effective sanction? There have been challenges of coordinating the proliferating mechanisms and instruments. And as Martin Murphy underscores, “The problem has been that no more than 30 warships – supported by even fewer aircraft - have been at sea at any one time, too few to adequately patrol the vast spaces involved. The number has usually been nearer 20, when 50 was estimated to be the minimum needed to patrol the Gulf of Aden alone.” Murphy emphasizes, “navies have rarely been able to exert sufficient dissuasive pressure at sea alone; to be effective they have had to deny pirates access to their bases on land.” ...Governments “have refused to sanction operations to neutralize pirate bases, forcing navies to confront the problem solely at sea.” Yet, acting under Chapter VII of the Charter of the United Nations, the Security Council decided in Resolution 1816 that states cooperating with the Transitional Federal Government of Somalia could enter and use the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such authorized action on the high seas.<sup>21</sup> Resolution 1846, which renewed the initial authorization, extended its application from states cooperating with the Transitional Government to include regional organizations and this has been renewed.<sup>22</sup>

Recently, the EUNAVFOR mission has expanded, and thus Leboeuf observes the “area of operations of the forces deployed ... shall consist of the Somali coastal territory and internal waters.” He argues “this extension targeting pirates on Somali soil needs to be clarified,” observing “that the mission seems to be more offensive.” EU and member State counter-piracy operations are complicated by a problem of State versus international organization responsibility. Cédric Leboeuf writes of the question of State responsibility” “ EU-NAVFOR actions are conducted under the responsibility of the Member States. Beyond the connections established

<sup>20</sup> See Charles H. Norchi, *Could Blue Berets Beat Piracy?* Lloyd's List, November 29, 2011.

<sup>21</sup> SC Res 1816, UNSC, 5902<sup>nd</sup> mtg, UN Doc S/RES/1816 (2 June 2008) para 7.

<sup>22</sup> SC Res 1846, UNSC, 6026<sup>th</sup> mtg, UN Doc S/RES/1846 (2 December 2008) para 10; SC Res 1950, UNSC, 6429<sup>th</sup> mtg, UN Doc S/RES/1950 (23 November 2010).

between the military forces and regional private and state entities, the framework for cooperation of the Atalanta operation do not relieve the Member States from their responsibility. Atalanta legitimates and reinforces the joint action of the Member States without engaging a direct responsibility for the EU.” Leboeuf observes that “any excess is likely to engage the international responsibility of the intervening state.” Hence there are sanctioning constraints.

Martin Murphy makes the point that, “ states have, one by one, begun to back away from their claim to monopolize the use of force at sea, because they are no longer willing to provide their navies with the resources necessary to do so. Western navies, in particular, have been forced to make a choice: either prepare to fight high intensity war, or secure the seas. The relentless decline in escort ship numbers makes clear the choice they have made.” James Kraska writes, “The naval coalition, being relatively cost-ineffective, is the wrong tool for the job of suppressing piracy, even at sea.... The answer is not to concentrate high-end warships, but rather to create a diffuse network consisting of private security and small boat coastal security and naval forces.”

#### LAW

Consider the authoritative decisions that power-based sanctions are intended to support. The counter-piracy legal framework is fraught with pathologies in that the sanctioning strategies of prevention, deterring, restoring, correcting and rehabilitating discussed above, are imperfectly performed. The legal architecture of our unorganized global arena is designed to generate stable patterns of authority and control and to limit the options of actors in the global social process. This includes pirates. All States are authorized to take measures against piracy irrespective of the national character of the offending ship. UNCLOS calls upon all States to cooperate in the repression of piracy<sup>23</sup> and provides for universal jurisdiction over acts for acts of piracy “in the high seas or in any other place outside the jurisdiction of any State.”<sup>24</sup> The decision to exercise jurisdiction resides with the discretion of the capturing State.

Somali piracy has been the subject of UN Security Council resolutions beginning with Resolution 1816 of 2008. The Security Council has considered the activities off the coast of Somalia as a threat to international peace and security and thus has invoked Chapter VII of the United Nations

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<sup>23</sup> UNCLOS, Art. 100

<sup>24</sup> UNCLOS, Art. 105.

Charter. Security Council Resolution 1918 (2010) urged Member States of the necessity “to criminalize piracy under their respective domestic laws,” while noting previous “cases when persons suspected of piracy are released without facing justice.” Matters of investigation and detention of pirates was a priority of Security Council Resolution 1976 (2011). Resolution 2015 (2011), calls upon the United Nations Office on Drugs and Crime (UNODC), United Nations Development Programme (UNDP), and international partners to further efforts to support the development of domestic legislation, agreements and mechanisms that would allow the effective prosecution, transfer and imprisonment of those apprehended and convicted. There are myriad counter-piracy prescriptions that authorize action. Yet as Michael Stepek writes in this volume, “there is a clear need for a coordinated approach, [yet] few specific potential solutions have been identified, and only sporadic and overlapping efforts have been undertaken by various state, multi-state and non-state actors.” Stepek summarizes the constitutive and sanctioning process limitations as follows:

- (1) The current international legal architecture concerning piracy is fractured,
- (2) The international legal architecture is intertwined with and dependent upon domestic law,
- (3) Universal jurisdiction is limited to piracy under customary international law and UNCLOS,
- (4) The international legal architecture addresses some of the challenges in investigating and collecting evidence for prosecutions, but they are neither complete nor have they been implemented by all ratifying states,
- (5) Successful prosecution is intertwined and dependent on national will.

Although the crime of piracy is well-founded in international law, as Stepek notes, “not every state has invested its courts with universal jurisdiction with respect to this crime.” He continues, “the international legal architecture relating to the problem is fractured in the sense that there is no single international instrument or source of international law that one can look to as a source of jurisdiction over, and proscription of, the various crimes associated with attacks on shipping, or the tools needed for the successful prosecution of them.” He urges the strategic use of international instruments specialized to related problems that could implicate piracy including the 1979 International Convention Against the Taking of Hostages, The UN Convention on Transnational Organized Crime, and the

International Convention for the Suppression of the Financing of Terrorism.

Obviously it is the State that must seize and prosecute a pirate. Stepek emphasizes that this is where the system breaks down, “there is no country in the region that has incorporated all of the applicable provisions noted above into their domestic legislation. At best, countries have adopted provisions against the specific crime of piracy into their maritime legislation, but they rarely go beyond the accepted definition included in UNCLOS, and may not criminalize all the various acts and actors in an attack on shipping off the coast of Somalia. Even prosecutions for the crime of piracy itself, while recognized internationally, can face unforeseen challenges when pursued at the domestic level.”

States have revised and modernize older anti-piracy laws. “In the absence of an international court with jurisdiction over pirates, the criminal prosecution of the pirates can only occur in domestic courts, hence the need for the states concerned to adopt legislation on piracy, writes Valérie Boré Eveno. Thus in France, “politicians realized that the punishment (and its deterrent effect) was an essential component in this fight.” Hence a new law was promulgated combining the implementation of international rules in the fight against maritime piracy with the rights and freedoms that the French state has undertaken under the European Convention on Human Rights.

Boré Eveno writes that “The new law breaks new ground ... taking advantage of the exceptional authorization given by international law if the acts genuinely meet the definition of piracy, it gives the French courts “quasi universal” jurisdiction to judge such acts.” But the jurisdiction of French courts will only be retained if the perpetrators (or associates) of acts of piracy were arrested by competent French agents and failing agreement with the authorities of another state to exercise court jurisdiction. If for example, another state accepts jurisdiction, particularly the state to which the perpetrators or victims belong, or if the pirate ship sails under its flag, those apprehended could then be turned over in order to be tried. France has been able to opt for this solution with respect to Somalia, as it regularly delivers alleged pirates to local authorities in the region of Puntland. Boré Eveno underscores that the new French legal maritime piracy framework “unfolds under the watchful eye of the European Court of Human Rights.”

In the United States Justice Story wrote in the 1820 case *United States versus Smith*, “The common law...recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the

law of nations (which is part of the common law), as an offence against the universal law of human society, a pirate being deemed an enemy of the human race.”<sup>25</sup> In this book Timothy Steigleman discusses the recent American experience, and explains that “Piracy is a federal crime under U.S. municipal law... ‘Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.’<sup>26</sup> However, the second element of the crime is a mere tautology: piracy is committed (under U.S. law) if someone commits piracy (under international law).” The cases Steigleman analyzes do not present a picture of clarity with respect to United States law in this area. He notes that future cases should serve as a better guide so that enforcement and prosecution of piracy can proceed with more certainty. This also underscores the lack of experience, even in the developed West, in prosecuting piracy cases.

Tom Tulloch writing in these pages expresses a widely shared observation. “For centuries piracy was treated very harshly indeed, with pirates being executed when caught, their vessels sunk, and their hideouts destroyed. Nowadays however, in our more enlightened times, such ruthlessness is frowned upon. Pirates today are treated as civilian criminals, with all the expansive interpretations of individual human rights inherent in that status. If pirates are captured they must be tried in court, however there is no international court in place with the authority to do so.” Today, a State choosing to exercise jurisdiction must be concerned about the wider international human rights implications. A suspect may demand asylum in the capturing State and may have a well-founded fear of persecution in his country of origin. A State that does exercise jurisdiction and decides to prosecute faces the challenge of collecting evidence, witnesses including naval experts, translating proceedings, ensuring the rights of the accused, a lengthy trial and possible incarceration. Instead, following capture some pirates have been set ashore uncharged. Until a coherent system is in place enabling the application of counter-piracy prescriptions that exist, the “catch and release” trend is likely to continue.

There are clear limitations to existing piracy sanctions at the international and national levels. Current strategies support only a minimum public order of the oceans. Arsanjani and Reisman write that “strategies dealing with modern piracy should develop around the one strategy which recommends itself for its feasibility: prevention, stopping piracy during its occurrence.

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<sup>25</sup> 18 U.S. (5 Wheat.) 153, 161 (1820).

<sup>26</sup> 18 U.S.C. § 1651 (2011).

The direct suppression of piracy that is, directly preventing pirates from boarding ships is crucial. That necessarily means a reversion to the types of self-help that were used by merchantmen plying the seas in earlier centuries.<sup>27</sup> As naval assets are redirected from pirate infested waters, so long as the political will of States to exercise jurisdiction remains tepid, if the UN Maritime Force proposal is shelved, there may well be an increased use of private security mechanisms as public sanction substitutes. However the burden on States to insure respect for humanitarian law and human rights will remain.

#### THE FUTURE AND THE ALTERNATIVES

Dr. Gaurier asks in these pages, “this increasingly complex problem presents increasingly complex questions. Is piracy merely a crime? Could it be, for some destitute peoples, just a means of subsistence? Or is it becoming, through funding, arms, and commissioning, a means to further a vague ideo-religious cause in the region?” Piracy incidents are claims. They are claims to wealth and perhaps more. They are also events that demand the attention of decision-makers which activate a response that can implement and perhaps create international policy.<sup>28</sup> As discussed throughout this book, authoritative international policy has long evolved in response to piracy incidents. However international law is dynamic and prescriptions do not remain constant. Conflicting demands, expectations and a stream of outcomes spawned by international incidents can lead to termination over time. The critical factor is elite response to piracy incidents. If present trends continue with inadequate sanctioning and ineffective application of power in support of law, existing piracy prescription will corrode into *lex imperfecta*.

Puntland President Farole writes that, “Somalia has begun to export its problems – particularly piracy and terrorism.” And the prospect of common interests and alliances among militant and insurgent groups is a troubling projection. Murphy, writes, “it is the destabilizing potential of militant Islamist groups al-Shabaab, in Somalia, and al-Qaeda in the Arabian Peninsula (AQAP), in Yemen, and the possibility that they might find some common cause, that worries many outside the region most.” Al-Shabaab has reportedly sworn to support AQAP and to exploit the opportunity for the conflicts on either side of the Gulf of Aden to become “increasingly

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<sup>27</sup> Mahnouch H. Arsanjani & W. Michael Reisman, East African Piracy and the Defense of World Public Order, p 156 in ...

<sup>28</sup> See, W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, in Myres S. McDougal, W. Michael Reisman, eds., *International Law Essays* (1981)



intertwined.” This concern is underscored by Simon Delfau who writes, “the development of the political and security situation in Yemen is very worrying. If Yemen becomes a *Somalia bis*, security in the Gulf of Aden will become particularly difficult to ensure, threatening even further one of the world’s most important sea passages.”

So long as human dignity in desperate coastal communities remains unfulfilled, value demands and legitimate claims remain unmet, these communities are excluded from the benefits of the 21<sup>st</sup> Century globalization and that is a recipe for the further expansion of piracy. If conditions and critical factors remaining unchanged present trends will generate a situation of drastic interruption of global shipping, spiraling costs for the industry and consumers, and even heavier burdens falling upon seafarers and their families. And as Murphy emphasizes, “pirates’ actions have raised serious concerns about international security regimes, the changing balance of power in the Indian Ocean and a reordering of the balance between state and private security in the maritime domain that has not been seen for nearly two centuries.”

The sociologist Daniel Bell wrote, “the future is not an overarching leap into the distance, it begins in the present.”<sup>29</sup> So what must be done in the present to achieve an alternative future? James Kraska writes that, “any long-term solution will have to involve the African states.” This means capacity building as urged by Claude Ichalanga in this volume. This requires stabilizing the TFG, supporting new coastal maritime forces to combat piracy in more tranquil autonomous Somali States such as Puntland, and it means implementing intensive international development and institution-building and educational programs.

The Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, has proposed a court system that would comprise specialized piracy courts in Puntland, Somaliland and an extraterritorial Somali court that would eventually be transferred to Mogadishu. The piracy courts would possess concurrent jurisdiction.<sup>30</sup> The Puntland specialized court and the extraterritorial court would have universal jurisdiction under the counter-piracy law. International support for a legislative framework for the proposed system, to train judges in the application of the new legislation, and to monitor trial proceeding, pretrial detention, and imprisonment would be critical. A counter-piracy law was

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<sup>29</sup> Daniel Bell, *The Year 2000- the Trajectory of an Idea*, Daedalus, 639 (summer 1967).

<sup>30</sup> See, Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, S/2011/30.

adopted by the Parliament of Puntland on 18 December 2010, a similar measure is pending in Somaliland, but it has not been adopted by the Parliament of Mogadishu. The present burden on prison systems discourage States from becoming involved in the prosecution of pirates. Enhanced correctional capacities would help end the practice of “catch and release.” Transfer agreements, effective bilateral treaties that would facilitate the transfer of apprehended pirate suspects, are an essential strategy.

Contributors to this book offer a number of recommendations under the rubrics of development, security and law. Among the recommendations under the rubric of development:

- Build a viable TFG government and institutions,
- Build on the Somali tradition of “bottom-up” governance,
- Engage autonomous Somali political entities,
- Introduce and scale up community driven development programs,
- Engage Somali women’s groups and Imams,
- Introduce small-scale infrastructure projects such as clinics, schools, roads, air-strips and electrical capacity,
- Create job opportunities in sectors that are locally identifiable,
- Support immediate and long term education programs,

Among the recommendations under the security rubric:

- Attack known pirate land bases in partnership with the TFG and regional governments,
- Target pirate leaders,
- Employ coastal and littoral vessels rather than high end warships,
- Disrupt pirate support networks, primarily those that supply weapons, fuel, outboard motors, skiffs and other equipment, imported from Yemen and the Gulf,
- Intelligence should focus on piracy finance networks within Somalia and abroad,
- Enhance support to the African Union Mission in Somalia (AMISOM),
- Assist responsible regional administrations, such as Puntland, to build counter-piracy capacity.

Among the recommendations under the rubric of law:

- Pressure States to ratify and implement all appropriate treaties,
- Devise model laws to serve as guides for local adaptation, and/or uniform laws to be incorporated by states into their domestic legislation,

- Provide technical assistance for piracy transfer agreements
- Enhance technical assistance to build penal and prison capacity,
- Convene a joint shipping insurance industry-wide to delineate what piracy risk entails,
- Overhaul the law of the flag,
- Fully implement Maritime Labor Convention standards.

President Farole, writes, “the future of Somalia depends on the continued development of the regional administrations like Puntland, and our ability to combat the two greatest threats to stability: piracy and terrorism, the latter generally perpetrated by al-Shabaab.... It remains vitally important that the international community develop genuine partnerships with Somali institutions to advance the process of stabilization, state building and reconstruction. Dealing with piracy alone – for example, through international military action – will not suffice, as piracy constitutes simply a part of the whole problem in Somalia.”

Clearly, in addition to maritime security efforts, eradicating piracy requires capacity building. This means penal system capacity, legal capacity, maritime protection capacity, and economic capacity including alternative livelihoods. Piracy roots must be attacked on land while the symptoms are attacked at sea. As with the poppy farmers of Afghanistan, a challenge is to identify and implement alternative livelihoods for the pirates of Puntland, and to target the delivery of development resources to local entities and autonomous regions that are reasonably tranquil and demonstrate a commitment to join the world community to defeat piracy.

#### **TOWARD AN OPTIMUM ORDER OF THE OCEANS**

In the 2011 *Masefield* case concerning the vessel *Bunga Melati Dua*, Lord Justice Rix wrote, “There is thus something of an unexpressed complicity: between the pirates, who threaten the liberty but by and large not the lives of crews and maintain their ransom demands at levels which industry can tolerate; the world of commerce, which has introduced precautions but advocates the freedom to meet the realities of the situation by the use of ransom payments; and the world of government, which stops short of deploring the payment of ransom but stands aloof, participates in protective naval operations but on the whole is unwilling positively to combat the pirates with force.”<sup>31</sup> This is an accurate picture of piracy and

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<sup>31</sup> *Masefield AG v. Amlin Corporate Member*, Royal Court of Justice, U.K. (2011)

our minimum public order of the oceans. But the future is not a prisoner of the present; an optimum public order of the oceans is achievable.

There are choices to be made and decision-makers should be guided by the principle of human dignity meaning that every human being possesses and a right to optimal self-realization through the sharing of all social values. Thus Gwenaële Proutière-Maulion in this volume urges that piracy also be conceived as a consequence of the globalization of trade, that it implicates the degradation of working conditions on board vessels and that a holistic approach would incorporate social justice goals. This is essential to achieving the optimum order goal, a world public order of human dignity.

Yet achieving those higher order goal requires attacking the roots of piracy on land and the symptoms at sea. Thus a double barrel strategy is necessary, or a what Proutière-Maulion terms a holistic approach. Fozia Lone writes that “poverty plays a significant role in piracy and thus a pure procedural approach to this problem can never exterminate it.” She cites Carlos Andres Perez, the President of Venezuela who opening the Third United Nations Conference on the Law of the Seas, stated “the seas could not be permitted to be used in such a way that a few countries benefited from it while the rest live in poverty, as had been done with the rich of the land.”<sup>32</sup> Peaceful enjoyment of the seas requires scaled-up development for poverty alleviation, training and educational programs and foreign investment. Power alone will not defeat maritime piracy.

In their seminal work, *The Public Order of the Oceans*,<sup>33</sup> Myres S. McDougal and William T. Burke wrote, “The historic function of the law of the sea has long been recognized as that of protecting and balancing the common interest, inclusive and exclusive, of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interests in contravention of general community interest.”<sup>34</sup> The authors’ key idea was the inclusive use and enjoyment of the oceans for all people. A common interest goal is framed in the preamble of the 1982 United Nations Convention on the Law of the Sea as “the desirability of establishing... a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources,

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<sup>32</sup> See, Warioba (United Republic of Tanzania) Third UN Conference on Law of the Sea, Official Records, Vol I, UN Publications Sales no E 75, v. 3 (New York, 1975) 36.

<sup>33</sup> Myres S. McDougal & William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, 1962 (1987, with new introductory essay).

<sup>34</sup> *Id* at 1.

and the study, protection and preservation of the marine environment.”<sup>35</sup>  
Maritime piracy, the causes and symptoms, contravenes our common  
interest of the oceans. It is hoped that this volume will stimulate creative  
thinking for the reader and for all who care about the oceans. It is hoped  
that this volume will provide fresh perspectives from diverse standpoints  
for decision-making that will achieve of an optimum order of the oceans.

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<sup>35</sup> Preamble, United Nations Convention on the Law of the Sea, signed at Montego Bay, Jamaica 1982.